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9 FIRST FEDERAL BANK OF CALIFORNIA  
10

11 IN THE UNITED STATES DISTRICT COURT  
12  
13 NORTHERN DISTRICT OF CALIFORNIA  
14

15 DEBORAH E. JOHNSON and  
16 GERALD D. JOHNSON,

17 Plaintiffs,

18 v.

19 FIRST FEDERAL BANK OF  
20 CALIFORNIA,

21 Defendant.  
22  
23

CASE NO. C08-00264PVT

[Ordered Related to Case No. 08-01796  
PVT]

NOTICE OF MOTION AND MOTION  
TO DISMISS PLAINTIFFS' FIRST  
AMENDED COMPLAINT AND  
IDENTICAL COMPLAINT IN  
REMOVED ACTION FOR LACK OF  
SUBJECT MATTER JURISDICTION  
AND FAILURE TO STATE A CLAIM  
UPON WHICH RELIEF CAN BE  
GRANTED; MEMORANDUM OF  
POINTS AND AUTHORITIES;  
DECLARATION OF CAROL BAXTER  
AND REQUEST FOR JUDICIAL  
NOTICE IN SUPPORT THEREOF

Hearing:

Date : June 3, 2008

Time: 10:00 a.m.

Courtroom: 5

Patricia V. Trumbell, Magistrate

24 **TO THIS HONORABLE COURT AND PLAINTIFFS, DEBORAH E.**  
25 **JOHNSON AND GERALD D. JOHNSON:**


26 **PLEASE TAKE NOTICE THAT** on June 3, 2008, at 10:00 a.m. or as soon  
27 thereafter as the matter may be heard in the above-entitled Court, located at 280 South  
28 First Street, San Jose, California 95113, Defendant FIRST FEDERAL BANK OF

1 CALIFORNIA (hereinafter "FIRST FEDERAL") will and hereby does move this Court to  
2 dismiss the First Amended Complaint (the "Amended Complaint") filed as Case Number  
3 08-00264 PVT, by Plaintiffs DEBORAH E. JOHNSON and GERALD D. JOHNSON  
4 (hereinafter referred to collectively as "Plaintiffs"), as well as the related, identical  
5 removed action filed by Plaintiffs and pending as Case Number 08-01796 PVT  
6 (hereinafter collectively referred to as the "First Amended Complaint"), with prejudice,  
7 pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) because Plaintiff,  
8 Gerald Johnson, lacks standing to bring the claims, the claims are barred by the statute of  
9 limitations set forth in 15 U.S.C. §1640(e) and 15 U.S.C. §1635(f), and the documents  
10 submitted as exhibits to the First Amended Complaint and to the Declaration filed  
11 concurrently herewith demonstrate that the Plaintiffs' claims are without merit.

12 This Motion is based on this Notice of Motion and Motion, the Memorandum of  
13 Points and Authorities, the Declaration of Carol Baxter, and Request for Judicial Notice  
14 filed herewith and any further evidence, oral or documentary, which may be presented at  
15 the hearing on this Motion.

16  
17 DATED: April 17, 2008

HEMAR, ROUSSO & HEALD, LLP

18  
19 By:   
20 PAMELA L. COX  
21 Attorneys for Defendant  
22 FIRST FEDERAL BANK OF CALIFORNIA  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**STATEMENT OF FACTS**

**A. The Factual Allegations of the Complaint**

In their First Amended Complaint, Plaintiffs DEBORAH JOHNSON and GERALD JOHNSON ("Plaintiffs") again allege that Defendant FIRST FEDERAL BANK OF CALIFORNIA (hereinafter the "Bank" or "Defendant") violated the Home Ownership and Equity Protection Act ("HOEPA") and Truth in Lending Act ("TILA") in connection with the loan secured by Plaintiffs' primary residence (the "Real Property"). (Amended Complaint, ¶1). To these previously plead allegations, Plaintiffs add purported violations of "federal and state" fraud laws, as well as the "RICO Act. "

To support these broad and varied theories of legal recovery, Plaintiffs allege the following *facts*:

1. That Gerald Johnson had an ownership interest in the Real Property;
2. That Defendant qualified Plaintiffs for a loan based upon the income of Gerald Johnson, which was \$155,000.00 for the year of 2005;
3. That Plaintiff Deborah Johnson did not have any income from January through June, 2005;
4. That prior to closing of the subject loan, Gerald Johnson was removed from title to the Real Property;
5. That prior to closing of the subject loan, Gerald Johnson had unsecured debt of \$109,552.00, which was not included in the loan application for the loan at issue;
6. That Gerald Johnson in his individual capacity was not provided with two copies of Notice of Right to Cancel the subject transaction; and
7. That the Plaintiffs did not receive notice in connection with the Bank's non-judicial foreclosure of the Real Property.

The remaining allegations in the Amended Complaint consist of improper legal argument and legal conclusions, which are not supported by the documents of this case,

1 and, interestingly enough, are contradicted by the bankruptcy proceedings filed by  
2 Deborah Johnson and Gerald Johnson, individually. Plaintiffs conclude their complaint  
3 with a request (1) that the court set aside the transfer (foreclosure) of the Real Property;  
4 (2) restore the right to rescission; and (3) punitive damages.

5 **B. The Facts Supported by the Exhibits to the Amended Complaint and**  
6 **attached to the Declaration of Carol Baxter Filed Concurrently Herewith**

7 Plaintiff, Gerald Johnson, is a real estate broker. (Request for Judicial Notice,  
8 paragraph 1).

9 Plaintiff Deborah Johnson and **her mortgage broker**, Pacific Mortgage  
10 Consultants, Inc. ("PCM") began efforts to obtain a loan in connection with the Real  
11 Property on February 27, 2005. (Declaration of Carol Baxter ("Baxter Dec."), ¶7, Exhibit  
12 1). In connection with these efforts, Ms. Johnson and PCM entered into an Authorization  
13 to Disclose, Broker and Borrower Document Certification, Mortgage Loan Origination  
14 Agreement and related documents, and submitted them to Defendant. (Baxter Dec., ¶7,  
15 Exhibit 1). On this same date, Ms. Johnson and J. Michael Galloway of PCM signed a  
16 Uniform Residential Loan Application (Baxter Dec, ¶ 7, Exhibit 1). On this application,  
17 Ms. Johnson did not list any income or credit card debt. (*See id.*).

18 On May 5, 2005, Gerald Johnson, as Deborah Johnson's attorney in fact, and  
19 PCM signed another Uniform Residential Loan Application. (Baxter Dec., ¶8, Exhibit 2).  
20 This second loan application listed Ms. Johnson as the sole borrower, represented that her  
21 monthly income was \$27,500.00<sup>1</sup> and set forth a number of credit card debts as liabilities.  
22 (*See id.*).

23 The first application, second application and a letter from Ms. Johnson's listed  
24 employer on both applications, The Care Financial Group, were submitted by Ms.  
25 Johnson and PCM to the bank. The applications signed by Ms. Johnson, Gerald Johnson  
26 as her attorney in fact and PCM's representative stated:

27 We fully understand that it is a Federal crime punishable by fine or imprisonment or  
28

---

<sup>1</sup> This monthly income would represent an annual income of \$330,000.00.



1 both to knowingly make any false statements concerning any of the above facts as  
2 applicable under the provisions of Title 15, United States Code, Section 1001, et seq.”

3 PCM was the Plaintiffs’ broker, not Defendant’s agent. (See Baxter Dec., ¶7,  
4 Exhibit 1).

5 Based upon the loan application and representations made by the Borrower,  
6 Deborah Johnson, through her loan broker, PCM, and her attorney in fact, Gerald  
7 Johnson, Defendant funded the loan secured by the Real Property.

8 In connection with the closing of the loan, Defendant provided the Borrower,  
9 Deborah Johnson, with two copies of the Notice of Right to Cancel. (Baxter Dec., ¶8  
10 Exhibit 3). These Notices were signed by the Borrower, through her attorney in fact,  
11 Gerald Johnson, on May 5, 2005.<sup>2</sup>

12 The loan closed on May 5, 2005. (Baxter Dec., ¶8, Exhibits 2-3, Request for  
13 Judicial Notice, Exhibit 1).

14 Beginning in May, 2007, almost one year ago, and continuing to this day,  
15 Deborah Johnson defaulted on the loan by failing to make the monthly payments. (Baxter  
16 Dec., ¶9). Accordingly, on July 12, 2007, Defendant commenced efforts to exercise its  
17 power of sale and recorded a Notice of Default and Election to Sell Under Deed of Trust.  
18 (Request for Judicial Notice, Exhibit 2). This Notice was mailed via first class mail and  
19 via certified mail to Deborah Johnson and Gerald Johnson as her attorney in fact, at the  
20 Real Property address, and to the P.O. Box listed as the Plaintiffs’ address on the  
21 pleadings filed in this case. (Baxter Dec., ¶10, Exhibit 4 - Affidavit of Mailing,  
22 Declaration of Mailing by Certified/Registered Mail). On August 2, 2007, this Notice  
23 was also mailed via first class mail and certified/registered mail to Deborah Johnson and  
24 Gerald Johnson at 27216 Prado Del Sol, Carmel, CA 93723. (Baxter Dec., ¶10, Exhibit  
25 4).

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26  
27 <sup>2</sup> It should be noted that the Borrower, through her attorney in fact, Gerald Johnson,  
28 exercised her right to rescind the transaction on May 5, 2005, and then changed her mind, and  
“rescinded” the rescission. A clean copy of the Notice of Right to Cancel was requested by the  
Bank through its employee, Darlene Phung. (Baxter Dec., Exhibit 3). The Plaintiffs do not  
dispute that Ms. Johnson rescinded the rescission.

1 Three months later, on October 15, 2007, a Notice of Trustee's Sale was  
2 recorded. (Request for Judicial Notice, Exhibit 3). On October 16, 2007, a Notice of  
3 Trustee's Sale was posted on the Real Property at issue, mailed to the Plaintiffs and  
4 published in "The Pine Cone," which was the local newspaper of general circulation in  
5 the Plaintiffs' area of residence. (Baxter Dec., ¶ 11, Exhibit 5). The Trustee's Sale was  
6 scheduled for November 8, 2007. (*See id.*).

7 On November 7, 2007, Plaintiff Deborah Johnson filed a chapter 13 bankruptcy  
8 petition. As stated in this Court's Order Granting Defendant First Federal Bank of  
9 California's Motion to Dismiss with Leave to Amend, "[i]n the various schedules, the  
10 residence was identified as an asset of the estate and the loan from the bank was identified  
11 as a liability. Gerald Johnson was not identified as a co-debtor on the loan whatsoever."  
12 (Request for Judicial Notice, Exhibit 7).

13 On November 8, 2007, the Trustee's Sale was postponed to February 8, 2008  
14 due to the bankruptcy filed by Deborah Johnson. (Baxter Dec., ¶12, Request for Judicial  
15 Notice, Exhibit 5).

16 On November 16, 2007, Gerald Johnson filed for Chapter 7 bankruptcy.  
17 (Request for Judicial Notice, Exhibit 4). He did not list First Federal Bank of California  
18 as a creditor in his bankruptcy filing. *See id.* Gerald Johnson's bankruptcy was  
19 dismissed due to his failure to file the requisite schedules. *See id.*

20 On January 4, 2008, Deborah Johnson's bankruptcy proceeding was dismissed.  
21 On February 6, 2008, at the hearing on Defendant's motion for relief from stay, the  
22 bankruptcy court found that there was no stay due to the dismissal of the bankruptcy on  
23 January 4, 2008. (Request for Judicial Notice, ¶ 5, Exhibit "7").

24 Accordingly, on February 8, 2008, Defendant proceeded with the non-judicial  
25 foreclosure. The Trustee's Deed Upon Sale was completed on this date, and recorded on  
26 February 12, 2008. (Request for Judicial Notice, Exhibit 5).

27 Plaintiffs have been living in a million dollar residence since May, 2007 for free.

28 ///

1 **C. Grounds for Dismissing Complaint**

2 The Plaintiffs' Amended Complaint is flawed as a matter of law and cannot be  
3 amended in any way to afford relief for the following reasons:

4 1. Documents of which this court can take judicial notice show that Gerald  
5 Johnson was not a party to the Loan and therefore does not have standing to bring the  
6 instant claim against the Bank.

7 2. Plaintiffs' alleged damages claims are barred by the one year statute of  
8 limitations set forth in 15 U.S.C. §1640(e).

9 3. The three year statute of limitations set forth in 15 U.S.C. §1635(f) does  
10 not apply, because (1) the Notice of Right to Cancel was proper and timely provided to  
11 the Borrower; (2) the non-judicial foreclosure sale cuts off the right to rescind; and (3)  
12 Plaintiffs received notice of the non-judicial foreclosure pursuant to *California Civil*  
13 *Code*, sections 2924, *et seq.*

14 4. Any fraud in connection with the transaction was committed by the  
15 Plaintiffs and their broker.

16 5. Plaintiffs have not properly alleged a cause of action under RICO.

17 **II.**

18 **LEGAL ARGUMENT**

19 Pursuant to FRCP 12(b)(6), a motion to dismiss as presented here is proper  
20 when the challenged pleading suffers either from "a lack of cognizable legal theory" or  
21 "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v.*  
22 *Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir 1990). As to the relevant burden of  
23 proof, in deciding a motion to dismiss based upon FRCP 12(b)(6), because the court must  
24 take all of the allegations of the pleading as true, a claim should not be dismissed unless it  
25 appears beyond a doubt that plaintiff cannot prove any set of facts in support of the claim  
26 entitling plaintiff to the relief requested. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2  
27 L.Ed.2d 80 (1957).

28 "However, the court is not required to accept legal conclusions cast in the form

1 of factual allegations if those conclusions cannot reasonably be drawn from the facts  
 2 alleged. “*Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9<sup>th</sup> Cir. 1994). Mere  
 3 conclusions couched in factual allegations are not sufficient to state a cause of action.  
 4 *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Further, in ruling on a motion to dismiss  
 5 under Rule 12(b)(6), the court may consider the documents attached to the complaint, if  
 6 its authenticity is not questioned. In addition, when the plaintiffs fail to introduce a  
 7 pertinent document as part of their pleading, the defendant may introduce the exhibit as  
 8 part of its motion attacking the pleading.” *Cooper v. Pickett* 137 F.3d 616 (9<sup>th</sup> Cir. 1997).

9       **A. SINCE PLAINTIFF GERALD JOHNSON WAS NOT A BORROWER**  
 10 **ON THE SUBJECT LOAN, HE LACKS STANDING TO MAINTAIN THE**  
 11 **CLAIMS FOR TILA AND HOEPA VIOLATIONS AGAINST DEFENDANT.**

12       In order to establish standing, a plaintiff must show that (1) he suffered an injury  
 13 in fact; (2) he can trace the injury to the conduct of the defendant; and (3) the court can  
 14 redress the injury to him by a favorable decision. *Skaff v. Meridien North America*  
 15 *Beverly Hills, LLC* 506 F.3d 832 (C.A.9.Cal., 2007) citing U.S.C.A. Const. Art. 3, §2,  
 16 cl.1. Further, standing is an aspect of subject matter jurisdiction. *Edwards v. First*  
 17 *American Corp.*, 517 F.Supp.2d 1199 (C.D.Cal. 2007). If a party lacks standing, the court  
 18 does not have jurisdiction as to that party. *Levina v. San Luis Coastal Unified School*  
 19 *Dist.*, 2007 WL 455045 (C.A.9., Cal. 2007).

20       In the instant case, the Amended Complaint alleges that Defendant violated the  
 21 TILA “in regard to Plaintiffs’ residence” and “in regards to material disclosures and right  
 22 to rescind for Plaintiff, Gerald Johnson.” (Amended Complaint, ¶¶ 1 & 5).

23       However, the TILA, as amended by the HOEPA (the “Acts”), applies to  
 24 “consumers,” which is defined by the Acts as “the party to whom credit is offered or  
 25 extended.” 15 U.S.C. 1602(h). Further, the Acts impose certain disclosure requirements  
 26 to the “person who is obligated on . . . a consumer credit transaction . . .” and “to whom  
 27 credit is extended.” 15 U.S.C. §§ 1631 & 1635(f). In the transaction at issue, Gerald  
 28 Johnson is not a “consumer” under the Acts.

1 It is not disputed that Gerald Johnson did not borrow any funds from Defendant  
2 Bank. However, in an attempt to get around this significant fact, Plaintiff Gerald Johnson  
3 alleges that prior to the funding of the subject loan, he was a co-owner and on title to the  
4 Real Property at issue. However, Gerald Johnson's ownership interest in the Real  
5 Property, or lack thereof, is not relevant to the claims under the TILA and HOEPA. These  
6 Acts only require that the requisite disclosures are made by the lender to the borrower on  
7 the account, not every person who will reside at or claim an ownership interest in the  
8 property. See 15 U.S.C. §1631, 1635(f); 12 C.F.R. §226.23(a)(1).

9 Further, in her bankruptcy schedules, of which this Court has already taken  
10 Judicial Notice, Ms. Johnson lists her debt with the Bank as a liability, but admits by  
11 omission that Gerald Johnson was not a co-debtor on the loan. (Request for Judicial  
12 Notice, Exhibit 7). Consistent with this position, in his own bankruptcy filing, Gerald  
13 Johnson did not list First Federal Bank as a creditor. (Request for Judicial Notice, Exhibit  
14 4). The Plaintiffs cannot play both sides of the fence and argue Gerald Johnson is a  
15 borrower for purposes of the instant action, but not for purposes of the bankruptcy  
16 proceedings. Such contrary positions are very telling as to the legal maneuvering the  
17 Plaintiffs will resort to in order to keep their claims alive.

18 In an attempt to get around the fact that he was not a borrower on the loan  
19 transaction at issue, Gerald Johnson alleges in the Amended Complaint that he was  
20 convinced by an agent of the Defendant at the loan closing on May 5, 2005 that he needed  
21 to be removed from the loan to receive it. However, the exhibits attached to the Amended  
22 Complaint and to the Declaration of Carol Baxter filed concurrently herewith demonstrate  
23 that this allegation is not only irrelevant, it's false.

24 Plaintiffs and *their* loan broker, PCM, filled out the application and presented  
25 the information contained therein to the Defendant. Further, two months *prior* to the loan  
26 closing, Deborah Johnson and PCM signed a loan application, which contained only  
27 Deborah Johnson as the borrower. (Baxter Dec., ¶ 7, Exhibit 1). According to the broker  
28 agreements, PCM would provide the loan application to several lenders, and not

1 exclusively to First Federal Bank. (Baxter Dec., ¶7, Exhibit 1). Thus, the documents  
2 demonstrate that it was the Plaintiffs and their agent's intent and design to have Deborah  
3 Johnson be the sole borrower on the property, not the Defendant's idea. It defies common  
4 sense that the Bank would want only half of the picture in deciding whether to lend  
5 almost \$1,000,000.00 to a borrower.

6 Consequently, as Plaintiff Gerald Johnson did not suffer an injury traceable to  
7 the alleged conduct of the Defendant, and lacks standing to assert a claim against the  
8 Defendant for violations of the TILA and HOEPA, the Court should grant Defendant's  
9 Motion to Dismiss the Complaint filed by Plaintiff Gerald Johnson under FRCP 12(b)(1)  
10 and 12(b)(6).

11 **B. THE PLAINTIFFS' CLAIMS FOR DAMAGES UNDER HOEPA AND**  
12 **TILA ARE BARRED BY THE ONE YEAR STATUTE OF LIMITATIONS**

13 In their Amended Complaint, Plaintiffs' admit that subject loan closed on May  
14 5, 2005. (Amended Complaint, p. 4, ¶2)

15 An action for damages under HOEPA or TILA must be brought within one year  
16 of the violation. *See* 15 U.S.C. §1640(e); 12 C.F.R. §226.23; *In re Community Bank of*  
17 *Northern Virginia*, 418 F.3d 277, 305 (3d Cir. 2005); *McMaster v. The CIT*  
18 *Group/Consumer Finance, Inc.*, 2006 WL 1314379, at \*4 (E.D. Pa May 11, 2006).  
19 Further, the violation occurs when the consumer becomes contractually obligated on the  
20 credit transaction. *McMaster*, 2006 WL 131479, at \*4. Thus, the one year statute of  
21 limitations begins to run on the date the loan closes. *Barbera v. WMC Mortgage Corp.*,  
22 2006 WL 167632 (N.D. Cal.).

23 In the instant case, the Plaintiff's loan with Defendant closed on or before May  
24 5, 2005. The instant action for damages under the TILA and HOEPA was not  
25 commenced until January 15, 2008, well over one year from the loan closing date.  
26 Accordingly, Plaintiffs' damages claim is barred by the statute of limitations and should  
27 be dismissed by the court with prejudice pursuant to FRCP 12(b)(6). See Request for  
28 Judicial Notice, Exhibits 1 & 7.



1           **C. PLAINTIFFS DO NOT HAVE THE RIGHT TO RESCIND THE**  
 2           **INSTANT TRANSACTION**

3           **1. Gerald Johnson is not an Obligor or Consumer under the TILA and**  
 4           **HOEPA and lacks the Right to Rescind**

5           In the Legal Argument and Conclusion sections of the Amended Complaint,  
 6           Plaintiffs assert that Gerald Johnson has the right to rescind the transaction under  
 7           15 U.S. C. §1635(f) and 12 C.F.R. §226.23 because prior to the loan transaction at issue,  
 8           he was on title to the Real Property. He goes on to contend that since he was previously  
 9           on title, he had a right to receive the Notice of Right to Cancel required under the TILA  
 10          and HOEPA.

11          The provisions in the TILA and HOEPA regarding the right to rescission are  
 12          found at 15 U.S.C. §1635 and 12 C.F.R. §226.23.

13          Section 1635(a) provides that “in the case of a consumer credit transaction . . . in  
 14          which a security interest . . . in any property which is used as the principal dwelling of the  
 15          person to whom credit is extended, the obligor shall have the right to rescind the  
 16          transaction until midnight of the third business day following the consummation of the  
 17          transaction or the delivery of the information and rescission forms required under this  
 18          section . . .” [Emphasis added.]

19          Section 1635(f) provides that “[a]n **obligor’s** right of rescission shall expire  
 20          three years after the date of consummation of the transaction or upon sale of the property,  
 21          whichever occurs first, notwithstanding the fact that the information and forms required  
 22          under this section . . . have not been delivered to the **obligor**. . .”

23          Section 1635(h) provides that “[a]n **obligor** shall have no rescission rights  
 24          arising solely from the form of written notice used by the creditor to inform the **obligor** of  
 25          the rights of the **obligor** under this section, if the creditor provided the **obligor** with the  
 26          appropriate form of written notice . . . or a comparable written notice of the rights of the  
 27          obligor . . .”

28          12 C.F.R. §226.23 is the companion to Section 1635, and contains similar

1 provisions and language; however, rather than the obligor, this section refers to the  
2 “consumer,” which is defined by the act as “the person to whom credit is offered or  
3 extended.” For purposes of the rescission rights under §226.23, the term also includes a  
4 natural person if that person’s ownership interest in the dwelling will be affected by the  
5 security interest. 12 C.F.R. §226.2(11).

6 Gerald Johnson was not an obligor or consumer on the transaction at issue in  
7 this case. He argues over and over again that he had an ownership interest in the Real  
8 Property, that he was on title to the Real Property prior to the closing of the loan at issue,  
9 and that he was advised by an agent (who turned out to be Ms. Johnson’s broker) to  
10 remove himself from the loan and application. **However, none of these assertions, some**  
11 **of which may be true and some of which may not be true, change the undisputed**  
12 **fact that Gerald Johnson was not an obligor, was not a person to whom credit was**  
13 **extended and was not a consumer in connection with this loan secured by Real**  
14 **Property.** In the Deed of Trust executed by Deborah Johnson on May 5, 2005 to secure  
15 the loan at issue, the property is listed as the property of “**Deborah Johnson, a married**  
16 **woman as her sole and separate property.**” (See Request for Judicial Notice, Exhibit  
17 1).

18 Even if the court were to assume that Gerald Johnson was convinced prior to  
19 loan closing to remove himself from the note and deed of trust and quitclaim ownership  
20 of the property to his wife, and that Gerald Johnson should under some stretch of the  
21 imagination be considered a “de facto” obligor or consumer on the transaction, he was  
22 given “de facto” Notice of the Right to Cancel. since he signed all of the loan documents  
23 as Deborah Johnson’s attorney in fact. Thus, even under this tenuous argument, Gerald  
24 Johnson does not have the right to rescind. *See* 15 U.S.C. §1635(h); 12 C.F.R.  
25 §226.23(a)(3).

26 **2. A Valid Notice of Right to Cancel was Given to Deborah Johnson, so**  
27 **the Three Year Statute of Limitations to Rescind the Transaction**  
28 **Does Not Apply**



1 As set forth herein above, 12 C.F.R. §226.23(a)(3) provides that “[i]f the  
2 required notice of material disclosures are not delivered, the right to rescind shall expire 3  
3 years after consummation, upon transfer of the consumer’s interest in the property, or  
4 upon the sale of the property, whichever occurs first.”

5 Further, the lender is required to deliver two copies of the notice of the right to  
6 rescind to each consumer, on a separate document, which contains “clearly and  
7 conspicuously” the following: “(i) [t]he retention or acquisition of a security interest in  
8 the consumer’s principal dwelling; (ii) [t]he consumer’s right to rescind the transaction;  
9 (iii) [h]ow to exercise the right to rescind, with a form for that purpose, designating the  
10 address of the creditor’s business; (iv) [t]he effects of rescission . . . ; (v) [t]he date the  
11 rescission period ends.” 12 C.F.R. §226.23(b)(1).

12 The Notice of Right to Cancel provided to Deborah Johnson (and signed by her  
13 “attorney in fact,” Gerald Johnson) complies with each of the requirements set forth in the  
14 Acts. (See Amended Complaint, Exhibit “G”, and Baxter Dec., ¶ 8, Exhibit 3).

15 Consequently, since a valid Notice of Right to Cancel was provided to Deborah  
16 Johnson, she does not have an extended, three year, right to rescind the subject  
17 transaction.

18 **3. A Proper Non-Judicial Foreclosure Sale was Conducted and Cuts**  
19 **Off the Right to Rescission**

20 Under 15 U.S.C. §1635(f), if the extended right to rescission is applicable, the  
21 consumer has three years from the consummation of the transaction, or upon sale of the  
22 property, which ever occurs first, to exercise the right to rescind. Further, section 1635(i)  
23 provides that “after the initiation of any judicial or non-judicial foreclosure process on the  
24 primary dwelling of an obligor securing an extension of credit, the obligor shall have the  
25 right to rescind the transaction . . . if (B) the form of notice of rescission for the  
26 transaction is not the appropriate form of written notice published and adopted by the  
27 Board or a comparable written notice, and otherwise complied with all the requirements  
28 of this section regarding notice.”

1 As set forth herein above, Deborah Johnson was provided with the proper Notice  
2 of Right to Cancel (and other disclosures) required under the TILA and HOEPA. Thus,  
3 the extended rescission period does not apply to the transaction at bar.

4 However, as mentioned at the hearing on Defendant's previous motion to  
5 dismiss the Complaint, the Real Property at issue was transferred to the Bank at a  
6 Trustee's Sale on February 8, 2008. In an attempt to get prevent their claims from  
7 becoming stale as a result of the one year statute of limitations set forth in section  
8 1640(e), and assuming the extended statute of limitations period in §1635 applies, the  
9 Plaintiffs are now alleging that the non-judicial foreclosure sale was improper because the  
10 Plaintiffs did not get notice of the sale. Again, the documents attached as Exhibits 4 and  
11 5 to the Declaration of Carol Baxter show that these allegations run contrary to the  
12 evidence in the case.

13 Pursuant to California *Civil Code* §2924, a foreclosure action is commenced by  
14 the recordation of a notice of default which must be mailed by registered or certified mail  
15 to the trustor. *Civil Code* §2924(b). As the attached declaration of Carol Baxter  
16 demonstrates, Defendant, through the trustee, properly recorded and mailed the requisite  
17 notice to the Plaintiffs. Moreover, after three months have elapsed from the notice of  
18 default, the trustee can proceed with recordation and service of the notice of sale. The  
19 notice of sale must be:

- 20 (1) Recorded 14 days before the sale *Civil Code* §2924f(b);  
21 (2) Mailed by certified or registered mail to the trustor 20 days before the sale *Civil*  
22 *Code* §2924f(b);  
23 (3) Posted on the premises 20 days from the date of the sale *Civil Code* §2924f(b);  
24 and  
25 (4) Published in a newspaper of general circulation once a week for three weeks  
26 *Civil Code* §2924f(b).

27 As the attached declaration of Carol Baxter establishes, Defendant fully  
28 complied with the requirements of *Civil Code* §2924f(b).

1 In the instant case on July 12, 2007, Defendant commenced efforts to exercise its  
2 power of sale and recorded a Notice of Default and Election to Sell Under Deed of Trust.  
3 This Notice was mailed via first class mail and via certified mail to Deborah Johnson and  
4 Gerald Johnson as her attorney in fact, at the Real Property address, and to the P.O. Box  
5 listed as the Plaintiffs' address on the pleadings filed in this case. On August 2, 2007, this  
6 Notice was also mailed via first class mail and certified/registered mail to Deborah  
7 Johnson and Gerald Johnson at 27216 Prado Del Sol, Carmel, CA 93723.

8 On October 15, 2007, a Notice of Trustee's Sale was recorded. On October 16,  
9 2007, a Notice of Trustee's Sale was posted on the Real Property at issue and mailed to  
10 the Plaintiffs. The Trustee's Sale was initially set for November 8, 2007.

11 On November 7, 2008, Deborah Johnson filed for Chapter 13 bankruptcy.  
12 Accordingly, due to the bankruptcy filing by the borrower, at the location and on the date  
13 listed in the Notice of Trustee's Sale of November 8, 2007, the Trustee properly  
14 postponed the Trustee's Sale to February 8, 2008. (See Request for Judicial Notice,  
15 Exhibit 5).

16 The Plaintiffs may argue that although they received notice of the original  
17 scheduled sale date of November 8, 2007, they did not receive notice of the February 8,  
18 2008 date. **However, in the event of a postponement made by public declaration by**  
19 **the trustee, "[n]o other notice of postponement need be given."** *California Civil*  
20 *Code*, section 2924g(d).

21 Consequently, as all of the documents and evidence point to a properly noticed  
22 and conducted non-judicial foreclosure and sale, the Plaintiffs' attempts to allege that they  
23 still have the right to rescind the foreclosure and the loan transaction at issue are without  
24 merit in fact and at law. As a result, their Amended Complaint should be dismissed by  
25 this Court without leave to amend.

26 **D. PLAINTIFFS' STATE LAW FRAUD CLAIMS ARE NOT PROPERLY**  
27 **ALLEGED AND NOT SUPPORTED BY THE DOCUMENTS OR STATEMENTS**  
28 **MADE BY THE PLAINTIFFS**

1 In addition to the claims made under the TILA, HOEPA and other federal  
2 statutes, Plaintiffs also attempt to allege common law fraud claims in their Amended  
3 Complaint. However, these claims are similarly improperly plead and without any factual  
4 basis.

5 In order to allege a cause of action for fraud (intentional misrepresentation), a  
6 plaintiff must be able to plead (1) a misrepresentation; (2) knowledge of the falsity; (3)  
7 intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Civ. C.* §1709;  
8 *Seeger v. Odell* (1941) 18 Cal.2d 409, 414; *Andrew v. Bankers & Shippers Ins. Co.* (1929)  
9 101 Cal. App. 566, 575.

10 Of the five elements set forth herein above, Plaintiffs have only alleged one,  
11 namely a misrepresentation. Plaintiffs allege that on the loan application submitted by  
12 Deborah Johnson through her "attorney in fact," Gerald Johnson, to Defendant to obtain a  
13 loan from Defendant, the income represented by Deborah Johnson was false and the  
14 liabilities represented by Deborah Johnson were incomplete. (Amended Complaint, page  
15 3, ¶1). This misrepresentation was made *by the Plaintiffs*, not by the Defendant. It was  
16 made by the Plaintiffs with knowledge of the falsity, with the intent to induce reliance by  
17 the bank, and which *caused the Defendant damages*. At the hearing on Defendant's first  
18 motion to dismiss, Plaintiff Gerald Johnson even admitted the same on the record. (See  
19 Request for Judicial Notice, Exhibit 6).

20 It is mind boggling how the Plaintiffs are somehow attempting to take  
21 misrepresentations made by them on their loan application and impute this improper  
22 conduct to the Defendant. It simply does not make sense that the bank would encourage a  
23 borrower to misstate her income and liabilities, just so the bank can lend her close to 1  
24 million dollars.

25 Ordinarily, since the Plaintiffs are in pro per in this legal proceeding, one could  
26 assume they should be given the benefit of the doubt. Perhaps they are confused and  
27 think that PCM, Deborah Johnson's mortgage broker, was actually the broker for the  
28 bank.

1           However, Gerald Johnson is a real estate agent, and was at the time the instant  
2 transaction was entered into in May of 2005. As such, he clearly has a working  
3 knowledge of the documents related to loans secured by real property, the importance of  
4 stating the truth on loan applications, and the identity of the players working as agents of  
5 the lender as distinguished from those working on behalf of the borrower.

6           In light of the foregoing, this court is urged to put a stop to the baseless  
7 allegations, endless filings and ever changing legal tactics, and dismiss the Plaintiffs'  
8 Amended Complaint without leave to amend.

9       **E.     SINCE FIRST FEDERAL BANK DID NOT VIOLATE THE TILA, AND**  
10 **DID NOT ENGAGE IN ACTS OF FRAUD, PLAINTIFFS CANNOT STATE A**  
11 **CLAIM UNDER RICO**

12           Plaintiffs include a superficial reference to RICO in paragraph 6 of the Amended  
13 Complaint. However, they do not allege any facts to support such a claim for relief, only  
14 summary legal conclusions.

15           In order to state a claim under RICO, the Plaintiffs must be able to plead and  
16 prove (1) the existence of an enterprise affecting interstate commerce; (2) that Defendant  
17 was associated with or employed by the enterprise; (3) the Defendant participated in the  
18 conduct of the affairs of the enterprise; (4) that Defendant participated in a pattern of  
19 racketeering which included at least two predicate acts; and (5) actual injury to the  
20 business or property of Plaintiffs. *Sedima, S.P.R.L. v. Imrex Co., Inc.* (1985) 473 U.S.  
21 479, 496, 105 S.Ct. 3275, 3285; *Gervase v. Sup. Ct. (Prudential Securities, Inc.)*, (1995)  
22 31 Cal. App. 4<sup>th</sup> 1218, 1230-32, 37 Cal.Rptr.2d 875, 883-884. Plaintiffs' Amended  
23 Complaint does not contain any such allegations against First Federal Bank.

24           In addition, the *Walker* case holds that where a plaintiff's claims for wrongful  
25 foreclosure and RICO violations are based on alleged TILA violations, and there are no  
26 TILA violations, such plaintiff cannot maintain a RICO cause of action. *Walker v*  
27 *Washington Mutual Bank* 2003 WL 1875536 (C.A.9 (Cal.)).

28           Consequently, as there are no TILA violations, no fraud on the part of the

1 Defendant and no RICO violations in the case at bar, Defendant's Motion to Dismiss the  
2 Amended Complaint should be granted.

3 **III.**

4 **CONCLUSION**

5 Based on the foregoing, Defendant FIRST FEDERAL BANK OF CALIFORNIA  
6 respectfully requests that the Court grant its Motion to Dismiss the Amended Complaint  
7 (including the complaint filed in the related case number 08-01796), for lack of subject  
8 matter jurisdiction and failure to state a claim upon which relief can be granted, without  
9 leave to amend, as the Complaint is fatally defective and cannot be corrected.

10 In the alternative, Defendant FIRST FEDERAL BANK OF CALIFORNIA  
11 requests that the Court consider the above motion as a Motion for Summary Judgment  
12 under FRCP 56 in light of the evidence submitted outside the four corners of the  
13 Complaint, and enter summary judgment in favor of Defendant.

14 Finally, Defendant requests any further relief which this Court deems  
15 appropriate.

16 DATED: April 17, 2008

HEMAR, ROUSSO & HEALD, LLP

17  
18 By: 

PAMELA L. COX  
Attorneys for Defendant  
FIRST FEDERAL BANK OF  
CALIFORNIA

PROOF OF SERVICE

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is Hemar, Rousso & Heald, LLP. ("the business") 15910 Ventura Boulevard, 12<sup>th</sup> Floor, Encino, CA 91436.

I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service; such correspondence would be deposited with the United States Postal Service the same day of deposit in the ordinary course of business.

On April 17, 2008, I served the foregoing document described as **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND IDENTICAL COMPLAINT IN REMOVED ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF CAROL BAXTER AND REQUEST FOR JUDICIAL NOTICE IN SUPPORT THEREOF** on the interested parties in this action by placing a true and correct copy thereof in a sealed envelope addressed as follows:

**DEBORAH E. JOHNSON**  
PO Box 4448  
Carmel, CA 93921-4448

**GERALD D. JOHNSON (Pro Se, Filing Party)**  
PO Box 4448  
Carmel, CA 93921-4448

XX At my business address, I placed such envelope for deposit with the      Federal Express or XX U.S. Postal Office by placing them for collection and mailing on that date following ordinary business practices.


     I delivered such envelope(s) by hand to the offices of the addressees.

     I caused such copies to be facsimiled to the persons set forth.

XX (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

     (Federal) I declare under penalty of perjury under the laws of the United States of America that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 17, 2008 at Encino, California.

  
LISA FIELDS